BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

THEODORE VAN HOLLAND Claimant VS. **CSU, LLC** Respondent AND **FEDERAL INSURANCE COMPANY** Insurance Carrier	)	Docket No. 1,040,931

ORDER

Claimant requested review of the September 14, 2009 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on December 8, 2009.

APPEARANCES

Dennis L. Horner, of Kansas City, Kansas, appeared for the claimant. Scott Gordon, of Overland Park, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award. At oral argument, the parties agreed that the 22.5 percent permanent partial functional impairment assigned by the ALJ is acceptable and is not the focus of this appeal. Thus, the 22.5 percent permanent partial functional impairment can be summarily affirmed.

ISSUES

The ALJ declined to award claimant a permanent partial general (work) disability as he concluded the "claimant's wage reduction is unrelated to the work injury, [and] it is not a wage reduction as contemplated in K.S.A. 44-510e which would trigger the work disability provision."[1]

The claimant requests review of whether the ALJ erred in failing to award work disability pursuant to K.S.A. 44-510e. Claimant contends that a direct causal connection between his injury and his post-injury wage loss is not required under a strict reading of the statute. Thus, claimant asks the Board to modify the ALJ's Award and grant him a 54.6 percent work disability (based on a 51.4 percent task loss and a 57.8 percent wage loss[2]).

Respondent contends that the ALJ's Award should be affirmed in every respect. Respondent maintains that claimant bears no task loss as a result of his injury. And that even if he sustained a task loss, his resulting wage loss is not causally related to his work injury. Accordingly, the ALJ was correct in denying claimant's request for work disability. At oral argument, respondent alternatively argued that if claimant is entitled to a work disability, his post-injury wage should include the value of his automobile expense/allowance.[3]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds that the ALJ's Award accurately sets out the factual circumstances surrounding claimant's compensable injury and his subsequent job termination in sufficient detail such that a further recitation is not necessary and that factual statement is adopted.

There is no dispute in this record that commencing in 2007, claimant's former employer was attempting to sell its business and had notified its employees, including claimant, that their positions would be eliminated as of June 30, 2008. Claimant was injured on March 26, 2008 and was unable to work the last three months as originally planned. But

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[1] ALJ Award (Sept. 14, 2009) at 4

[2] This wage loss is based on claimant's actual post-injury salary of $39,500 per year.

[3] This argument was not presented to the ALJ at either the Regular Hearing or in respondent's submission letters, nor was this issue itemized in the ALJ's Award. The Board will not consider arguments that have not previously been offered to and considered by the ALJ.

once he was released from care, on January 15, 2009, he immediately began searching for work. Claimant says that he "made it a full-time job to try to get a job."[4]

Fortunately, claimant secured a position with another company on June 8, 2009. His annual salary is $39,500 and he receives a car expense allowance of $335 per month plus mileage (.17 per mile). Although claimant believes there is the possibility that he will receive a phone allowance, that fact has yet to decided by his present employer. As of the date of the Regular Hearing, claimant had worked less than 2 weeks but believed, in spite of the increased standing and walking, and the need to carry a tool belt while working, he would be able to do the job.

When claimant was released by Dr. Greg Horton, no specific restrictions were imposed although he was advised to wear his ankle brace. At his deposition, Dr. Horton further explained that at the time he released claimant from treatment, he had a discussion with claimant and explained that he should not look for work outside his skill set and keep in mind the significant problems he will have in light of his injury.[5] These problems include substantial difficulty squatting and kneeling.[6] Out of courtesy to claimant, and in the hopes of increasing his chances of obtaining employment, he did not impose any permanent restrictions at that time other than the general recommendation that he wear his ankle brace and self limit his activites.

Dr. Horton was then asked to consider the task loss in light of the list of tasks identified by Mr. Cordray. Of the 31 total tasks identified, he opined that claimant lost a total of 12 tasks out of the 31, leaving claimant with a 38.7 percent task loss.

At claimant's request claimant was also examined by Dr. Prostic, who imposed the following restrictions: no standing or walking for more than 30 minutes per hour, minimize walking on uneven surfaces, squatting, kneeling, and climbing, no lifting below knee height and no lifting or carrying weights greater than 40 pounds occasionally or 15 pounds frequently.[7]

Based upon these restrictions, Dr. Prostic opined that claimant was unable to perform 7 out of 11 tasks identified by Michael Dreiling, which leaves claimant with a 64 percent task loss.[8]

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[4] R.H. Trans. at 20.

[5] Horton Depo. at 8. Pursuant to the parties' stipulation, claimant's injury includes permanent impairment to his back, left knee and right heel.

[6] *Id.* at 16.

[7] Prostic Depo., Ex. 2 at 4 (Dr. Prostic's Dec. 12, 2008 report).

[8] *Id.* at 18.

The decisive issue in this case stems from claimant's post-injury wage loss. The ALJ declined to award any permanent partial general (work) disability even though it undisputed that claimant has, in fact, sustained a wage loss following his work related injury. The ALJ offered the following analysis:

> . . . there must be a causal relationship between the work injury and the post-injury reduction in wages. The whole premise of the workers compensation act is to compensate employees, within certain limits, for losses resulting from injuries on the job. It was not enacted to provide compensation for losses from any cause whatsoever. This premise carries to every section of the workers compensation act without being expressly repeated in every section.
>
> In the present case, the fact that the claimant had to leave his employment with the respondent and find another job which didn't pay as well had nothing to do with the work injury. His position was eliminated because the company was sold. He was going to lose the job and have to seek other employment whether the injury occurred or not. There was nothing in the record to suggest the work injury limited the claimant's efforts to find employment. . .
>
> Because the claimant's wage reduction is unrelated to the work injury, it is not a wage reduction as contemplated in K.S.A. 44-510e which would trigger the work disability provision. Permanent partial disability in this case shall be limited to functional impairment.[9]

Respondent obviously endorses the ALJ's analysis while the claimant does not, asserting that recent case law compels the Board to reverse this portion of the ALJ's Award.

K.S.A. 44-510e does not require a nexus between the injury and the loss of employment.[10] The statute merely dictates two percentages are to be averaged when determining a work disability:

> First , "the extent ... to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident," and
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> Second, "the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury."[11]

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[9] ALJ Award (Sept. 14, 2009) at 3-4.

[10] *Stephen v. Phillips County*, 38 Kan. App.2d 988, 174 P.3d 452, *rev. denied* 286 Kan. ___ (2008).

[11] *Id.* at 994, 174 P.3d at 456.

The *Stephen* Court went on to note that "[t]he statute is quite straightforward in its direction to compare the pre-injury and post-injury wages, and no mention is made that the reduced wage must have been directly caused by the injury."[12]

Moreover, our Supreme Court has recently indicated that statutory provisions are to be strictly construed.

> When a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. The court will not speculate on legislative intent and will not read the statute to add something not readily found in it. If the statutory language is clear, there is no need to resort to statutory construction.[13]

As claimant notes, there is nothing within the Workers Compensation Act that expressly predicates a work disability award upon a post-injury wage loss due solely to the work-related injury. To the contrary, the statute provides:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.[14]

The statute does not condition the entitlement to work disability upon a wage loss that occurs as a result of the injury. Rather, as long as the claimant is engaged in *any work* for wages equal to 90 percent, then no work disability is owed. But if claimant is *not* so engaged, then work disability is to be considered based upon the formula set forth in the statute. The entitlement to work disability is conditioned upon the wage loss and the statute makes no reference to the reasons for that wage loss.

Admittedly, this approach to determining an injured employee's entitlement to a work disability award is a wholesale abandonment of the courts' previous approach to this issue. Up until the pronouncement of *Bergstrom*[15], workers compensation practitioners and the courts were called upon to evaluate the parties' relative "good faith" both in offering, finding and/or retaining post-injury employment. The finder of fact would balance the parties' actions or inaction and determine a claimant's entitlement to permanent partial general disability (permanent impairment in excess of a functional impairment). But the Supreme Court's express findings in *Bergstrom* have overruled that analysis. A showing of good

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[12] *Id*.

[13] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676, Syl. ¶ 1 (2009).

[14] K.S.A. 44-510e(a).

[15] *Bergstrom v. Spears Manufacturing Company*, ___ Kan. ___, 214 P.3d 676 (2009).

faith is no longer required as an element of a workers compensation claim for work disability, either on the part of a claimant looking for appropriate post-injury employment or on the part of a respondent in offering such employment. Thus, the Board's analysis need now only consider whether claimant has sustained a wage loss following his work related injury.[16]

The Board has considered respondent's strident arguments to the contrary, but nonetheless finds that claimant is entitled to a work disability under K.S.A. 44-510e(a). He has sustained a wage loss following his compensable injury and that his wage loss exceeds the statutory threshold. Thus, that portion of the ALJ's Award that denied a work disability is reversed.

Claimant is presently employed and earning $759.62 per week.[17] His pre-injury job earned him an average weekly wage of $1,800.15 (including fringe benefits), leaving him with a wage loss of 57.8 percent.

Although respondent has argued that claimant has no task loss, the Board disagrees. Claimant sustained a significant injury and although Dr. Horton did not initially assign restrictions, he did so in the hopes of maximizing claimant's employability. His deposition testimony makes it clear that claimant does have restrictions and those restrictions have resulted in a task loss. Dr. Prostic also assigned restrictions and considering both physicians' opinions, the Board finds claimant has sustained a task loss of 51.4 percent.

When the 51.4 percent task loss is averaged with the 57.8 percent wage loss, the result is a 54.6 percent work disability. The Award shall be modified to reflect this finding.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated September 14, 2009, is affirmed in part and reversed in part as follows:

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[16] One can only imagine the scenarios that will play out given this new analysis and approach to workers compensation claims. The lawyers in this claim suggested that an injured worker who is subsequently terminated for subsequent unlawful acts would, under *Bergstrom*, be entitled to a work disability award. In essence, post-injury conduct seems to be wholly irrelevant to an injured workers' ongoing employability and entitlement to permanent partial general (work) disability.

[17] This figure reflects claimant's annual salary of $39,500 and does not include the $350 in car allowance/expense reimbursement. Although respondent orally argued that some or all of that figure should be included in claimant's post-injury wage, that argument was not presented to the ALJ, it was not itemized at the Regular Hearing, nor was it briefed in the submission letters presented to the Board. Thus, that argument will not be considered by the Board. The Board will not address arguments that are not made to the ALJ.

The claimant is entitled to 40.00 weeks of temporary total disability compensation at the rate of $510.00 per week or $20,400.00 followed by 62.57 weeks of permanent partial disability compensation at the rate of $510.00 per week or $31,910.70 for a 22.50 percent functional disability followed by permanent partial disability compensation at the rate of $510.00 per week not to exceed $100,000.00 for a 54.60 percent work disability.

As of December 22, 2009 there would be due and owing to the claimant 40.00 weeks of temporary total disability compensation at the rate of $510.00 per week in the sum of $20,400.00 plus 50.86 weeks of permanent partial disability compensation at the rate of $510.00 per week in the sum of $25,938.60 for a total due and owing of $46,338.60, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $53,661.40 shall be paid at the rate of $510.00 per week until fully paid or until further order from the Director.

All other findings and conclusions contained within the ALJ's Award are hereby affirmed to the extent they are not modified herein.

IT IS SO ORDERED.

Dated this _____ day of December 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Dennis L. Horner, Attorney for Claimant
Scott Gordon, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge